

April 20, 2018

VIA ELECTRONIC MAIL

Hon. Ashley Moreno and Hon. Erika Bergen
Administrative Law Judges
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223-1350

Re: Case 15-M-0127: In the Matter of Eligibility Criteria for Energy Service Companies

Case 12-M-0476: Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New York State

Case 98-M-1343: In the Matter of Retail Access Business Rules

Retail Energy Supply Association's Letter in Support of the National Energy Marketers Association's Motion to Stay Evidentiary Proceeding

Dear Judges Moreno and Bergen:

The Retail Energy Supply Association (“RESA”)¹ respectfully submits this letter in support of the National Energy Marketers Association’s (“NEM”) Motion to Stay the Evidentiary Proceeding in cases 15-M-0127, 12-M-0476 and 98-M-1343.

As articulated in NEM’s Motion, a core issue in these proceedings revolves around the scope of the Public Service Commission’s (“Commission”) legal authority to regulate the rates and product offerings of Energy Service Companies (“ESCOs”). Notably, the New York Court of Appeals recently granted both NEM’s and RESA’s Motions for Leave to Appeal the Third Department’s decision in the *Matter of Retail Energy Supply Ass’n v. Pub. Serv. Comm’n of the State of New York*.² In that decision, the Third Department held that the Commission’s “authority allows it to impose limitation on ESCO rates as a condition to continued access [to the utility systems].”³ As articulated in its own Motion to Leave for Appeal, RESA believes that the

¹ The positions expressed in this filing represent the position of the Retail Energy Supply Association as an organization, but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than 20 retail energy suppliers dedicated to promoting efficient, sustainable, and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial, and industrial energy customers.

² *Matter of Retail Energy Supply Ass’n v. Pub. Serv. Comm’n of the State of New York*, 152 A.D.3d 1133 (3d Dep’t 2017), appeal docketed, No. APL-2018-00047 (N.Y. Mar. 27, 2018).

³ *Id.* at 1138.

Third Department's decision is fundamentally unsupported by law and vastly exceeds the Legislature's intended limits of Commission authority to regulate ESCOs.

The Court of Appeals' rare grant of RESA's and NEM's Motions for Leave to Appeal is a clear demonstration of the importance of the issues presented in this Evidentiary Proceeding. Given the centrality of the issues before the Court of Appeals to these proceedings, RESA agrees with NEM that requiring the parties to submit reply papers under the present circumstances is inefficient.

The significance of the issue of the Commission's authority to regulate ESCO rates and products is fully displayed in the immediate proceedings in the Department of Public Service Staff's ("Staff") Initial Brief.⁴ Staff takes substantial unfounded liberties to expound on the extent of Commission authority to regulate ESCOs, which of course, has yet to be determined by the Court of Appeals.⁵

Any Recommended Decision or Commission Order issued in this proceeding will certainly pass on the same issues as are now before the Court of Appeals. In fact, if the Court of Appeals rules before a Recommended Decision or Commission Order, the parties are sure to request the opportunity to brief the matter anew. And if the Court of Appeals rules after a Recommended Decision or Commission Order, the judicial decision may well upend the administrative determination requiring additional administrative proceedings to address newly settled issues of law. In short, waiting for the Court of Appeals to decide the central issues in the Evidentiary Proceeding will be most efficient for all involved.

For the foregoing reasons, RESA offers its full support for NEM's Motion to Stay the Proceeding in cases 15-M-0127, 12-M-0476 and 98-M-1343.

Respectfully submitted,

/s/

David G. Burch, Esq.
Ekin Senlet, Esq.

BARCLAY DAMON LLP
125 East Jefferson Street
Syracuse, New York 13202
315.425.2788
dburch@barclaydamon.com
Counsel to Retail Energy Supply Association

⁴ Case 15-M-0127, *et al.*, *In the Matter of Eligibility Criteria for Energy Service Companies*, Staff Initial Brief (filed on Mar. 30, 2018) (hereafter "Staff Initial Brief").

⁵ *See e.g.* Staff Initial Brief at 20-21, 24.

Hon. Ashley Moreno and Hon. Erika Bergen
April 20, 2018
Page 3

cc: Hon. Kathleen H. Burgess, Secretary to the Commission
Active Parties in Parties in Cases 15-M-0127, 12-M-0476 and 98-M-1343